No. 175. 25.

Brief of Putnam for Appts.

Filed Jan. 15, 1897.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896

Office Supreme Court, U. S.
FILED.
JAN 15 1897
JAMES H. MCKENNEY,
CLERK.
No. 175.

THE STEAMTUG "JOHN G. STEVENS," HER engines, etc., Edward H. Loud and others, owners of the "C. R. Flint," intervenors and appellants.

against

FREDERICK H. GLADWISH AND OTHERS, libellants and appellees.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS

HARRINGTON PUTNAM
Advocate

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

The steamtug JOHN G. STEVENS,
EDWARD H. LOUD and others, owners of the schooner C. R. FLINT,
Appellants,
AGAINST
FREDERICK H. GLADWISH *et al.*,
Appellees.
No. 175.

BRIEF FOR THE APPELLANTS.

This is heard upon a certificate from the Circuit Court of Appeals from the Second Circuit, desiring the instruction of this court upon a question of the priority of maritime liens.

The schooner *C. R. Flint*, while in tow of the steamtug boat *John G. Stevens*, collided with another vessel through the negligence and fault of the tug. The tug boat was duly proceeded against *in rem* and condemned. A libel *in rem* also proceeded to a decree against the tug boat to enforce a lien for coal that had been supplied to the tug under the law of the State of New York.

The court asks:

Is the lien for damages occasioned by negligent towage, which arose on March 8th, 1886, to be preferred to the previous State lien for supplies, the libel for supplies being filed last?

This case in which this question arises was decided by the District Judge for the Eastern District of New York in favor of the supply lien.

The *John G. Stevens*, 58 F. R., 792.

The argument in this court will be (I) on the general question of priority between maritime liens for reparation of

damage and those as security for debt, in which it will be shown that in the Anglo-American maritime law damage liens outrank the others. (II) The lien against the tug boat for negligent collision in favor of a vessel towed is also *ex delicto*. (III) The considerations of public policy which require that these liens for reparation of wrongs shall be on the whole damaging vessel, and not on the encumbered personal interest of the owner. (IV) The effect of the law of limited liability of vessel owners on the question of full reparation for maritime torts. (V) The continental laws relating to the lien for collision.

I.

THE MARITIME LIEN FOR REPARATION OF DAMAGE OVERREACHES PRIOR CONTRACT DEBTS IN THE ADMIRALTY, AND THE RIGHT OF THE SUITOR IN A CAUSE OF TORT IS PARAMOUNT TO THE LIEN OF A CONTRACT CREDITOR OF THE OWNER.

In 1839 this question was considered by Doctor Lushington in case of a collision, where the contest was between the owners of the injured vessel and one who had guaranteed the payment of repairs and was treated as a holder of a bottomry bond.

After stating the principle of the English procedure *in rem*, Dr. Lushington said:

"Now, leaving out of the investigation mariners' wages and prior salvage, to which a different consideration applies, here are, I think, only two descriptions of claim which it is necessary for me to examine in the present instance, namely, mortgage and bonds of bottomry. In both of these cases I apprehend that the mortgagee and the bondholder cannot take any right greater than the owner could confer, namely, a lien on the ship as security against the owner and all who claim under him. I am also of the opinion that neither the mortgagee or bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason that the mortgage or bottomry bond might and often does extend to the whole value of the ship; if, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy, more especially where (as in this case) the damage is done by a

foreigner, and the only redress is by proceeding against the ship. Another reason that would incline the preponderance in favor of the person suffering the damage arises from the consideration that he has no option or no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks and advance his money or not, as he may think most advisable for his own interest. He has an alternative; the suitor in a cause of damage has none."

The *Aline*, 1 W. Robinson, 111, 118.

While much of the above opinion was not essential to the decision, it has been cited and always followed as an authority in the British Admiralty courts.

The question reserved in the above opinion as to the priority between damage claims and liens for seamen's wages has been decided by Doctor Lushington against the wages claims, which were postponed to liens for damage.

The *Benares*, 7 Notes of Cases, 50.
The *Chimæra*, reported in Shipping and Mercantile Gazette, 27 Novr. 1852, and cited in the *Elin*, 8 P. D., 43.
The *Linda Flor*, Swabey 309; also 6 W. Rob., 197 (1857).

The same rule was followed in the Admiralty Courts of Ireland, in 1861.

The *Duna*, 1 Aspinall Mar. Cas., 159.

It is finally settled in England.

The *Elin*, 8 P. D., 39; affirmed ditto, p. 129.

In deciding this point on appeal, Lord Justice COTTON said:

"The principle that the owner who has caused the damage shall not be at liberty to withdraw any part of the fund arising from the value of the ship and freight out of the reach of the claimant for damage is, I think, a just one. I can see no reason, therefore, why we should reverse the existing rule, which has been formulated by these several decisions." (8 P. D., 131).

The present order of liens in England is stated as follows, by a text writer of high authority:

"The liens for damage, as by collision, attach at the instant of collision, and rank against ship and freight adversely to the

owner or mortgagee, or any beneficial charge for value which might exist at the time of the collision, including a bottomry bond, and also before prior wages, prior pilotage, towage and salvage." Foard, Law of Merchant Shipping, p. 217 (London, 1880).

"And the damage lien takes precedence of charges upon the ship arising out of a contract, such as mortgages and bottomry bonds, whether prior or subsequent to the collision in date, liens for wages whether earned before or after the collision, liens for pilotage, and (probably) the possessory lien of a shipwright for repairs."

Marsden, Collisions at Sea, p. 82, (3rd ed., London, 1891.)

See also Abbott on Shipping, (12th English ed.), p. 597.

Maclachlan distinguishes liens in the nature of reparation from beneficial liens. Speaking of the former he says:

"Such liens rank against ship and freight in derogation of any rights of ownership or rights by mortgage, or beneficial lien, existing at the time of the collision. They acquire thereby priority over mortgages, prior bottomry, wages, pilotage, towage and salvage, and subsist adversely to proprietary interests and claims."

Law of Merchant Shipping, pp. 741, 742 (4th ed., 1892).

In the United States the law was early declared by this Court to be that the entire damaging vessel is devoted to making complete restitution to the injured party, and for this purpose of reparation the delinquent vessel is even personified as itself the offender.

In the United States *v.* the brig *Malek Adhel*, 2 Howard, 233 (1844), Judge Story, delivering the judgment of the Court, said:

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The ship is also, by the general maritime law, held responsible for the

torts and misconduct of the master and crew therof, whether arising from negligence or a wilful disregard of duty; as for example, in cases of collision and other wrongs done upon the high seas or elsewhere, within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

The cases in which the courts have considered the responsibility of the vessel for collision show that it is the *thing* which is impressed with the lien, by reason of it causing the damage, independent of the will or volition of the owner, or of the relation of master and servant between the owner and the crew. In the case of The *China*, 7 Wall., 68, Mr. Justice Swayne said:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors.

"But while the law limited the creditor to this part of the owner's property, *it gave him a lien or privilege against it in preference to other creditors* * * * the collision impresses upon the wrong-doing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come, it is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

In the case of the *Siren*, 7 Wall., 152, the steamship *Siren* had been captured by the steamship *Gladiolus* while attempting to break the blockade at Charleston, S. C., and was placed in the charge of a prize crew and ordered to Boston. She put into the port of New York for coal, and on her voyage through Hell Gate sank the schooner *Harper*. She was condemned as prize by the U. S. District Court of Massachusetts. The owners of the *Harper* intervened by petition, but the District Court rejected their claim. It was contended that the vessel, being in charge of a prize crew, the doctrine of master and servant did not control, since the Government is never held to respond for the acts of its servants.

The Supreme Court reversed the decree of the District Court, and held the *Siren* liable for the collision.

Mr. Justice Field, said (p. 155):

"For the damages occasioned by the collision of vessels at sea, a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case, the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel."

It is a necessary consequence of this rule of liability *in rem*, that the entire value of the damaging vessel becomes a pledge to the injured party for restitution. Hence, no part of this security can be withdrawn through prior contracts of the ship owner. Such liens must be postponed to the rights of the damage sufferer.

Accordingly, Mr. Justice Bradley treated the principle of the superiority of damage liens as axiomatic, saying:

"Liens for reparation of wrong done *are superior* to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other, if they arise from the same cause. We think, therefore, that the lien of the libellants for the loss of the schooner and her cargo, arising from the collision, is on an equality with the lien for the loss of the cargo of the steamer for the same cause."

Norwich Co. *v.* Wright, 13 Wall, 104, 122.

By this decision it was determined that, although the owner of the steamer *City of Norwich* was at fault for the collision with the schooner *Electra*, and could limit its liability, only the liens for collision could come into concourse, that is, the claims of the schooner and cargo, and the cargo of the steamer herself; but that liens growing out of the debts of the petitioning owner were inferior in rank.

It is believed that no subsequent authority in this court has ever modified this salutary rule, which for twenty-five years has been followed in proceedings for limitation of liability of ship owners.

In the First Circuit the decisions of Doctor Lushington

postponing the liens for wages to the rights of suitors for collision were followed by Judge Lowell in 1870.

The *Enterprise*, 1 Lowell, 455.
Veazie v. The *Frank Herbert*, Mss. Opinion—see Appendix.

The doctrine of the entire liability of the damaging vessel has also been fully accepted in the First Circuit. In 1881, Judge Lowell said:

"If a ship, in command of a pilot, whom it was compelled to take, injures another ship through the fault of the pilot, the ship is liable unless exonerated by statute. If charterers are owners for the voyage, and appoint the master and crew, the ship is still liable. If she were navigated by pirates who had run away with her, she would, in my opinion, be responsible to the injured ship."

The *Arturo*, 6 F. R., 308, 313.

In the Second Circuit, after some divergence of views between the learned Judges of the District Courts of New York, precedence has finally been given to a tort over an earlier contract lien.

In the *Boston*, Blatchford & Howland Rep., p. 309, Judge Betts, in 1832, gave a decree to freighters for their lien for damage to cargo, and directed that the proceeds in the registry, after satisfaction of this lien, should be retained to meet an earlier claim by material men, whose libel was on a bottomry bond, where the bond itself had been held invalid.

In 1853, Judge Hall, in the Northern District of New York, decided that the lien of the injured vessel in collision was of equal grade with contract liens, and preferred it because later in time, under the rule of inverse order of creation.

The *America*, 16 L. Reporter, 264; 1 Federal Cases, No. 288.

Judge Betts, in the Southern District of New York in 1857, gave priority to the lien of the shipper of goods for loss of cargo, over a claim for labor and articles furnished in the home port, though the latter were secured by mortgage.

Justi Pon *v.* the *Arbustci*, 14 Fed. Cas., p. 62.

In the *Pride of the Ocean*, 3 F. R., 162 (1880), Judge Ben-

edict, in the Eastern District of New York, gave priority to the lien for collision over earlier bottomry. In the *Samuel J. Christian*, 16 F. R., 796 (1883), he gave priority to the subsisting supply and material liens over a claim for damages from negligent towage.

In the *Frank G. Fowler*, 17 F. R., 656, where both competing claims were in tort, Mr. Justice Blatchford, at Circuit, reversing Judge Choate, gave priority to the earlier in point of time, thus overruling the doctrine of payment of maritime liens in the inverse order of their creation.

Judge Addison Brown, in the Southern District of New York, gave priority to earlier contract claims, holding that damage claims were to be postponed, in analogy to the code provisions for the ranking of privileges on vessels, in continental countries.

The *Young America*, 30 F. R., 789.
The *Amos D. Carver*, 35 F. R., 665.

The collision in the case at bar gave rise to a damage lien not only against the *John G. Stevens*, which was towing the schooner *C. R. Flint*, but also against the tug *R. S. Carter* which was towing the other colliding vessel. The lien of the libellants against the *Carter* was therefore a pure tort. Judge Benedict gave these libellants as damage sufferers preference over the earlier supply claims.

The *R. S. Carter*, 38 F. R., 515.

Upon appeal to Mr. Justice Blatchford, at Circuit, he referred to the above divergencies of decision and said:

"This difference of opinion between the judges of two of the District Courts in this circuit on the same question makes it important for this Court to establish a rule which shall be one of uniformity in the District Courts of this circuit upon the question." (40 F. R., 333.)

After exhaustive citation of the authorities this disagreement was settled for the Second Circuit by Mr. Justice Blatchford in 1889, who held that the collision lien outranked those for supplies furnished prior to the collision.

The *John G. Stevens*, 40 F. R., 331; 42 F. R., 413.

In the Third Circuit the question has always been decided in favor of the damage lien, even against a claim for wages.

In the *Maria & Elizabeth*, the District Judge for New Jersey decided in 1882 the question of the right of libellants in decrees for wages to compete with the lien for negligent collision in proceedings for limitations of liability. Judge Nixon said:

"The *pro rata* distribution of the fund, when the amount is not sufficient to pay all claimants in full, provided for by section 4284 of the Revised Statutes, relates to a distribution among those whose losses arise from the collision, and has no reference to other liens of an inferior grade and quality upon the wrong-doing vessel. A decree for damages in a cause of collision overrides all prior liens. There has been a struggle to except the wages of seamen, which are always looked upon with favor in the admiralty Courts, but it has not been successful.

"In the *Linda Flor*, Swabey, Adm. 309, Dr. Lushington held that the claim of a party having obtained a decree in a cause of damage is prior to that of a seaman for wages, assigning as a reason that the seamen are not shut up to their libel *in rem*, but may also maintain an action *in personam*, which cannot be done by one suffering damage from a foreign vessel. He was followed by Judge Lowell in the case of *The Enterprise*, 1 Low. 455, partly because the vessel complained against was a British vessel, and hence subject to the English law, which postpones the lien of the seamen's wages to that of a libellant in a cause of damage, and partly upon the ground that seamen have other available remedies for their wages, and because mariners of the wrong-doing ship may be supposed to share in the fault of the vessel.

"And the law is thus stated by the Supreme Court in *Norwich Co.* v. *Wright*, 13 Wall., 122, where Mr. Justice Bradley, speaking for the whole Court, says: 'Liens for reparation for wrong done are superior to any prior liens for money borrowed, *wages*, pilotage,' etc." 12 Fed. Rep. 630, 631.

He also gave the like preference to a damage towing claim over a lien for supplies.

The *M. Vandercook*, 24 F. R., 472.

In the *E. A. Barnard*, 2 F. R., 712, the Judge of the Eastern District of Pennsylvania, held in 1880, as between contract liens, that those for supplies created by the State laws, were but *quasi* maritime, and should be postponed to liens under the general maritime law.

In the Fourth Circuit, in 1880, Judge Giles, in the District of Maryland, held that the lien under the contract of affreightment for non-delivery of cargo took precedence of prior liens for supplies, citing The *Rebecca* by Judge Ware, and Justi Pon *v.* the *Arbustci*, by Judge Betts.

Hatton *v.* The *Mellita*, 3 Hughes, 494.

In the Fifth Circuit, it was held in the Circuit Court for the Eastern District of Texas, that liens for damage to goods override state liens for suppplies subsequently furnished.

The *Lillie Laurie*, 50 F. R., 219.

In the Sixth Circuit, damage claims are given the priority.

Rusk *v.* The *Freestone*, 2 Bond, 234.

Judge Swan in the Eastern District of Michigan declared his approval of the law preferring tort liens.

The *Nettie Woodward*, 50 F. R., 224.

This rule has been also accepted as to competing supply claims, but not as to wages, by Judge Severens in the Western District of Michigan.

The *Daisy Day*, 40 F. R., 548.

The question was carefully reviewed by the Circuit Court of Appeals for the Seventh Circuit, with the result that the collision lien was held superior even to prior liens for wages.

The *F. H. Stanwood*, 49 F. R., 577.

From this summary it is confidently asserted that in every Admiralty Court in this country, liens for damage are now accepted as outranking contract liens—except only those for mariners' wages, where the practice is not quite uniform.

II.

THE LIEN FOR NEGLIGENT COLLISION AGAINST THE TUGBOAT IN FAVOR OF A VESSEL TOWED IS A VERITABLE DAMAGE LIEN, AND NOT EX CONTRACTU.

The learned District Judge said:

"The claim of Loud although in a certain sense, a claim *ex delicto*, arises out of the neglect on the part of his employe in the performance of a contract, voluntarily entered into by Loud. Loud selected a careless tug to tow the *Flint* and suffered thereby. It was at his option what tug should be given the opportunity to injure the *Flint*. In the exercise of this option, he selected a careless one, responsible indeed to him for any damage to the *Flint* caused by negligence, but given the opportunity to do damage to the *Flint*, by the voluntary act of Loud. In this respect, the claims of Gladwish, Moquin & Co. and of Loud stand on the same ground. In respect to the time of the inception the claims differ. The claim of Gladwish, Moquin & Co. for coal arose prior to the claim of Loud." (58 F. R., 793.)

It was conceded by the Court that the lien for reparation of actual wrong would prevail over a lien for supplies. The judgment in favor of the coal claim rests entirely on the attempted distinction that this collision in law was either an omission to fulfill contract obligations, or that the voluntary selection of the towing vessel takes it out of the category of damage claims.

It is respectfully submitted that this distinction is unsound.

The precise nature of such a towing liability for collision was considered by Dr. Lushington in 1862. The statute of 24 Vict., ch. 10, sec. 7, conferred admiralty jurisdiction to the courts to entertain "any claim for damage done by any ship." The steamtug *Nightwatch* was libeled *in rem* by the owners of the *Prince* for bringing about a collision between the towed vessel and the bark *Julia*. The owners of the tug protested that the action was for breach of contract and not a cause of damage. Doctor Lushington said:

"I am of opinion that this protest which has been filed on behalf of the owners of the *Nightwatch* cannot be sustained.

I must take it that the *Prince* by the improper navigation of the *Nightwatch* which was turning her, was brought into collision with the *Julia*. *This was damage done by the Nightwatch.*"

1 Lushington Ad. Rep., pp. 542, 543.

In 1863, however, Dr. Lushington held that the word "damage" used in the statute "must be taken according to the well understood meaning of the phrase in the Admiralty Court, namely, damage by collision," and he therefore declined jurisdiction of a claim for negligently towing a vessel aground.

The *Robert Pow*, Br. & Lush., 99.

It has been questioned if this narrow and technical limitation is sound, and the later writers submit that the decision must rest upon some broader principle.

Williams & Bruce, Admiralty practice, p. 73 (ed. 1876).

In 1869 this Court considered the legal relation between the tug and tow where the tug had stopped and backed owing to one of the boats becoming detached from the tow, whereby the tug herself collided with the barge *Citizen*, one of the boats towed. The owners of the barge alleged in their libel *a contract* with the tug for a stipulated price and also the negligence causing the injury.

Mr. Justice Davis said:

"The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the *Quickstep*."

The *Quickstep*, 9 Wall., 655, 670.

In 1870, this Court had also a suit in admiralty by a canal boat in tow against the steamboat *Syracuse*, which had towed the canal boat into collision with an anchored vessel. The contract as embodied in the receipt was "at the risk of her master and owners."

Mr. Justice Davis, delivering the opinion of the Court said :

" It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

12 Wall., 167, 171.

If the duty of the tug to tow in respect to collisions were only a matter of contract, then proof of the contract, with evidence of collision damage, would establish a *prima facie* case against the tug. That contract theory has been learnedly urged upon this Court in a case where the tow was lashed alongside the tug. It was however, unanimously rejected, the Court holding that some *fault* must be proved.

The *L. P. Dayton*, 120 U. S., 337.

In a case of a contract of towage, where the tug carelessly brought the towed vessel into collision with a pier, Mr. Justice Blatchford, then District Judge, said:

" The only point of discussion, therefore, is whether the present case is one of tort. Now, the fact that the steamboat was at the time of the loss engaged in towing the canal boat, under a contract of towage, either express or implied, does not make the negligent and careless navigation of the steamboat in performing such towage any the less a tort toward the canal boat or her cargo, if injured thereby, than it would have been toward a third and stranger vessel which should have been injured thereby. * * * * * This view is sustainable entirely aside from any of the doctrines upon which the cases in regard to pure contracts are placed. In cases of contracts for affreightment and contracts for supplies, the obligation of the delinquent rests wholly upon the contract, and arises wholly out of it. In the present case the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage, any more than the obligation of a third vessel meeting the canal boat on her trip,

not to collide with her, arose out of such contract, or out of any contract. The obligation of the steamboat not to commit such tort arose out of the principle, applicable in all cases of tort—*sic utere tuo ut non alienum laedas*. Her duty did not result from the consideration paid for the towage. It was imposed by the law, and would have existed even though her services had been gratuitous. * * * (552). The present action, therefore, both on the libel and in fact, is one of tort, founded on negligence, and this court has jurisdiction of it."

The *Brooklyn*, 2 Ben., 547 (1868).

The same Judge in a case where the libel alleged a contract of towage, and that, in towing, the steamboat towed the barge on a sunken pier, the existence of which was well known, said :

"If the steamboat was negligent in her navigation in towing the barge, whether she was towed under a contract of towage or not, she was as much guilty of a tort toward the barge, if the barge was injured through such negligence, as she would have been toward a third and stranger vessel which should have been injured through such negligence. Her duty not to be guilty of such negligence was imposed by the law and existed even though the service of towing was gratuitous."

The *Deer*, 4 Ben., 353 (1870).

To the same effect are

The *Liberty*, *No 4*, 7 Feb. R., 226.
The *Frank G. Fowler*, 8 F. R., 331 ; 17 do., 653.
The *M. G. Cummings*, 18 F. R., 178.

In the *Arturo*, 6 F. R., 308, 312, Judge Lowell, said :

"These cases of tow against tug are in form and fact very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others, which it may meet. There is, therefore, an analogy between the two classes of cases, so close, that the tow may sue, in one proceeding for damage, her own tug and a strange vessel with which there has been a collision."

See also Judge Benedict's comments on the *Samuel J. Christian*, 15 F. R., 796, in the *R. S. Carter*, 38 F. R., 516.

The foregoing authorities are clear that while a contract of towage may be set forth by way of inducement, the real

foundation of the demand is the tort and negligence of the vessel towing. It is not questioned in the present case that the libel of Loud proceeds upon the tort, and states the right cause of action against the tugs.

In 1885 the question of priorities between negligent towing and supplies was considered by Judge Nixon in the District Court of New Jersey. He states the question to be:

"Did these damages arise *ex contractu* or *ex delicto?*" After a review of the cases, he concludes:

"The claims, then, being *ex delicto* and not *ex contractu*, they have a higher rank, and should be paid before the claims for repairs and supplies."

The *M. Vandercook*, 24 F. R., 473, 478.

In 1887 Judge Addison Brown, in the Southern District of New York, postponed the claim of negligent towage as arising from a *quasi* tort, upon arguments, however, that apply with nearly equal force to pure torts.

The *Young America*, 30 F. R., 789.

As repeated decisions have thus established that the liability of the tug is really in tort (unless as in the case of *The Samuel J. Christian*, the tort is waived and only the contract set up) this distinction against the priority of towing liens for collision, if maintainable at all, must stand on the single ground of the previous *voluntary* relation of the parties. But this is even more true of cargo and its lien on the carrying vessel.

It might be urged that the lien for cargo damage was voluntary and arose from the fact that the shipper had himself selected a negligent ship master to carry his goods, and therefore should be postponed to a liability without such a voluntary relation.

This Court in the *City of Norwich* has expressly decided that the lien of cargo on the delinquent carrying steamer was entitled to equal rank with the lien of cargo on the libelling schooner, and in doing so expressly held that contract liens were postponed. Instead, therefore, of this ruling of Mr. Justice Bradley being a *dictum*, as is sometimes urged, it was

essential to the decision, and is decisive against any such postponement of *quasi* torts.

This reasoning was very clearly stated by the District Judge for the Western District of Michigan in 1889. After reference to the decision of this Court in Norwich Co. *v.* Wright, Judge Severens said :

"But it cannot be doubted that the Supreme Court did adjudge in that case, that the claim for the loss of the cargo laden upon the offending vessel under a contract of affreightment was entitled to the same rank, and to share equally with the claims for the injury to the wronged vessel and its cargo. It was necessary for the Court to decide that question, because the damages of the libellants did not extend to the amount at which the liability of the ship-owner was limited by the Act of Congress ; and unless the value of the cargo upon the libeled vessel would share with the claim of the libellants (which was for the value of the lost vessel and its cargo) no further question was in the case. But the Court, having held as above stated, proceeded to adjudge the other questions upon that footing. And it seems to me that that adjudication destroys the validity of the reasoning pursued in the New York cases above cited. Their argument is that, conceding the damages resulting from collision are entitled to priority over claims for supplies and the like arising *ex contractu*, still the damages resulting from fault in towage arise substantially from a breach of contract, and are suffered by one who has voluntarily come into contract relations with the towing vessel, as distinguished from one who has exercised no freedom of action, as in a case of collision. And the inference drawn is that the damages, being thus essentially for breach of contract, must rank with ordinary claims arising upon contract, and fall under those arising out of tort, as in collision. But every incident thus assumed as the basis for the difference of rank in claims for collision and negligent towage exists in the case of claims for damages to the cargo on board the offending ship in collision. Surely, there would be no solid ground for distinguishing in this particular between claims arising out of a contract of affreightment and those arising out of a contract for towage. Besides, the question whether a claim is one in contract or for tort is by no means a sure test of priority, as the course pursued in one of those cases of giving priority for seamen's wages shows. But, aside from all that, the reasoning adopted by those Courts to show that a claim arising from negligent towage is in its nature and analogies *ex contractu* is not, I must say, with great deference, satisfactory to me, and it seems that the view taken by Judge Nixon in *The M. Vandercook* is the correct one, (and see, also, *The Liberty No. 4*, 7

Fed. Rep., 226 ;) for, although the parties are in contract relations, they contemplate the opposite of negligence. By the contract the towing vessel undertakes the duty of vigilance and skill. It is quite similar in its general features to that implied in the contract for carriage, though it may not be in all respects the same. Is the duty which binds to skill and watchfulness any the less because the contract relation exists? The law imputes the duty in either case, whether to a vessel proceeding on her course among strangers, or to one who has by stipulation undertaken an obligation wherein the law implies that duty as specifically and distinctly due to one. An action in tort would lie for a violation of that duty, (*The Quickstep*, 9 Wall., 665,670,) and I know of no rule of law or anything in reason which should lead to any distinction in the character of the duty or in the merits of the claim for damages in the two cases."

The Daisy Day, 40 F. R., 540.

In the *F. H. Stanwood*, 49 F. R., 577, the Circuit Court of Appeals for the Seventh Circuit, in 1892, reviewed the authorities on damage and contract liens. Judge Jenkins said (p. 581) of the New York decisions, based on the distinction out of a voluntary relation of tug and tow :

"It may be doubted whether in the light of the cases of the *Quickstep*, 9 Wall., 665, and Norwich Co. *v.* Wright, 13 Wall., 104, the distinction can be upheld."

It is manifest that if a shipmaster at sea hails a tugboat, and the tug injures the vessel by negligence *before* she has received the towing hawser, there is no difference in the character of the wrong done, and there should be none in the remedy afforded, between this prior collision and a like injury *after* the towing had been completed.

The so-called voluntary relations between the tug and tow are entirely different from the coal debt of the tug.

The coal Company was a voluntary creditor of the tug owner both in giving the coal and because it had the option of allowing the tug owner a delay, taking in the meantime a statutory lien, a *jus in re*. On every voyage, after delivery of the coal, this quasi-proprietary right was in effect renewed, and the credit extended by the Coal Co., which elected to wait on the tug's future earnings. The option and indulgence were both before and after the full liability as contemplated, had been voluntarily accepted.

Taking the tug *Stevens* to tow the schooner was not the voluntary choice of a *negligent* tug. At this initial stage of the voluntary relations, there was no negligence. The tug was bound to tow with care. Tug and schooner merely agreed on a mode of navigation, in which the tug furnished the traction power. Out of all the tugs in port, the *Stevens* was the one that had undertaken this towage. So, out of all the steamers on Long Island Sound, the *City of Norwich* was selected to transport cargo. Likewise in every case of injury to passengers, it may be said that the passenger had entered into a voluntary relation with the carrier.

When this collision did come, the liability of the tug to the schooner damaged was hardly more a matter of agreement than the collision of two independent steamers which had previously agreed on a mode of navigation through assenting whistles. The duty of reparation comes as a natural right in all these cases of maritime tort, and the resulting lien is not impaired by the fact of such pre-existing contract relations.

When the right of reparation arose, libellants enforced their lien by a prompt judicial arrest of the tug.

The libel of Loud was also on behalf of the cargo laden on the *C. R. Flint.** Could it be seriously claimed that this lien for *cargo* damage against the *J. G. Stevens* was postponed to the tug's unpaid coal bills?

Did the *shipper* of cargo on the *C. R. Flint* in any legal sense choose the *J. G. Stevens*, and thereby voluntarily release his claims to priority?

It is submitted that the true rule is that whether the suit be cargo against ship, or tow against tug, the *gravamen* is the wrongful destruction or damage to property with its consequent lien against the offending *res*, and the prior voluntary relation of the parties is immaterial in the ranking of these liens.

*The damages to the schooner in the decree without interest were $4,665, while the cargo loss adjudged was $8,205.26. 41 F. R., 156.

III.

IT IS AGAINST PUBLIC POLICY TO ALLOW THE SHIP-OWNER TO ENCUMBER HIS VESSEL WITH CONTRACT LIENS THAT HAVE A CONTINUING PRIORITY, SO AS TO DIMINISH AND DESTROY THE REMEDY FOR COLLISIONS AT SEA.

The preservation of life and property at sea require that the remedy for collision shall be sedulously preserved, and the full value of the delinquent *res* appropriated to the satisfaction of collision damages. This is the foundation of admiralty proceedings *in rem*. If a tugboat owner can, through a State statute, reserve any part of his vessel for the payment of his coal bills, there is an obvious advantage in running harbor tugs plastered over with supply liens, which would constitute an effectual destruction of a tort liability, reducing what would be left of the *res* to the vanishing point.

In the case of coal supplied to a steamtug, there is no actual betterment of the *res*. The tug simply gets fuel to keep her going.

If the question be looked at in a wider view, it is difficult to see any reason why the prior bottomry creditor should escape the consequences of a subsequent collision, which is one of the hazards of navigation, for which he charges and receives his maritime premium. Other supply claims that are not in the class of bottomry, are usually doubly secured, having along with the lien a remedy *in personam*, which certainly postpones them to collision creditors who can only look to the offending *res*.

The suggestion that the interests of commerce require credits to be given and the security of liens to aid vessels in strange ports has two answers.

(1.) These liens are recognized. But by the very fact of such a lien the lienor becomes thereby interested in the vessel, and her subsequent navigation is partly at the lienor's risk—a risk not only of total loss, but of total absorption by newer liens either in contract or tort.

It is an anomaly to give a creditor a maritime lien that shall be independent of future liabilities of the vessel even for twenty-four hours. But if such a continuing priority of lien

could ever be granted, it should be on different grounds from those invoked by a supply man in the home port.

(2.) Such a change has been worked in the commerce of the world by the facility of cable and telegraph conmunication, that at the present time hardly any port is beyond the reach of the ship-owner, and the resources of his personal credit.

For this reason, among others, the maritime commerce of England has no lien for necessaries, and it is not perceived that it lacks those "wings" which ship credits in the home port are thought to supply.

If the ancient law of liens is to be changed—if the former rule of priorities is to be overturned—then the increase of sea casualties and greater frequency of collisions should give to the collision creditor, if any lienor, the privilege of a continuing priority independent of subsequent casualties.

IV.

THE STATUTE LIMITING THE LIABILITY OF VESSEL OWNERS GIVES DAMAGE LIENS A PRIORITY OVER EARLIER SUPPLY CLAIMS.

The tow has two remedies against the tug. It can proceed *in rem*, as in the case at bar, or personally against the owners of the tugboat. If the latter, the owners of the tugboat could reduce and limit their liability to the value of their interest in the boat. In such a case could the unpaid coal claims incurred prior to the collision voyage come in to absorb the amount of the owner's liability? Clearly not.

The *Leonard Richards*, 41 F. R., 818, 820.
Gokey *v.* Fort, 44 F. R., 364.
The *U. S. Grant*, 45 F. R., 643.
Benedict's Admiralty (3d ed.), p. 334.

The admiralty law has shut off the claimant of damages from any fund save the value of the wrongdoing vessel on the voyage where the collision occurs. On this voyage the liabilities are distinct from any previous voyages. No lien created by the Legislature of New York can be permitted to

break over this established rule of the general maritime law.

This being in accordance with justice, it follows that what the coal merchant could not do in concourse with all the claims on a voyage, he cannot do after the vessel has been already arrested under the collision process of the damage claimant alone. The very fact that presumably he has another remedy against the resident owners effectually prevents the domestic supply man from either taking a dividend in limitation proceedings, or from absorbing any part of the damaging *res* by a subsequent libel.

Liens for supplies obtained in the home port stand on a different footing from those furnished abroad. The law presumes the presence of the shipowner at the home port, and his personal obligation for payment. If a State statute confer a lien in addition, the lienor for coal has a double remedy—to sue the owner, or to pursue the *res*.

> The *Belfast*, 7 Wall., 624, 643.

As holder of these two remedies, he cannot absorb the proceeds of the vessel, to the prejudice of the damage lien, which runs only against the *res obligata*.

> Coote, Admiralty, 122, 123.
> The *Sailor Prince*, 1 Ben., 461.

A modern writer has remarked that a sea-going ship is an engine often of great power and capable of doing great damage to person and property outside itself. That therefore in the interests of public security, the ship herself makes her owner liable to the extent of her value and the freight; and that even if the law of the home port should discharge the owner from all liability for reparation, still the law of the forum enforcing the liability of ship and freight can be rightly applied to insure the safety of the public and the equality of all before the law.

> Bar, Private International Law, Guthrie's translation, p. 716 (2d ed.).

So long as the value of the offending *res* with its pending earnings is distributed to pay for injuries done, all vessels stand equal before the law. Take from one value the unpaid coal and supply bills and leave only the residue as a compensatory

fund, and there is no longer equal justice. If two steamtugs of like value are towing the same vessel, and both concur in producing the same injury to the tow, why should the damage claimant get the full value of one offending tug and not the other?

The door that would thereby be opened to collusion and fraud is manifest.

Such a rule would disregard the safety of the public, and the equality of all before the law, for the sake of favoring delinquent debtors, over solvent cash-paying shipowners.

V.

THE EFFECT OF CONTINENTAL LAWS UPON THE DAMAGE LIEN.

The decisions of the Southern District of New York, postponing the maritime lien for collision, are based largely on the analogy of the continental codes of commerce. If the Admiralty Courts of this country are to derive their rule of priorities from these modern legislations, it must be acknowledged that the deductions by the Honorable Addison Brown, from a most learned and comprehensive survey of the provisions of modern codes, are adverse not merely to the *priority* of a lien for damage, but are against its very existence as a privilege.

But are these codes, enacted since 1808, any authority here? What is considered of far more weight—the older maritime law itself—is only so far operative as law in any country as it is adopted by the legislation and usages of that country.

> The *Lottawanna*, 21 Wall., 558.
> The *Scotland*, 105 U. S., 24, 29.
> Liverpool S. Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 444.

Has any foreign code-ranking of maritime privileges been adopted in the United States, or in any outside country, save by express legislation? When many of these codes were enacted, already the United States had a law of priority, derived, not from any mere municipal and separate code, but

from those older *fontes* of right that had for ages embodied the real maritime law of all the seas.

The argument was made in the Courts below that as the relation of tow to tug is analogous to cargo in a carrying vessel, the lien of the tow for collision should be postponed to the same order as the lien for cargo damage.

In the Ordonnance de la Marine the privileges of cargo claims for damage were put last.

This ranking was sharply critised by Emerigon.

See the *Rebecca*, Ware, 188, 193.

Emerigon said:

"It seems that the lien of those whose merchandise has been lost or diminished by average resulting from any other cause than the peril of the sea *ought to be placed first*, even before the seamen, because such losses or damage generally proceed from their fault. It would be much more just to give shippers the preference to those who have lent money before the departure; because the former are ignorant of the provisions and loans that have been furnished in the place of equipment. But the Ordonnance places them only in the fourth rank, although the second is allotted to them by the Consolato."

Emerigon, Contrats à la Grosse, Hall's Trans., pp. 236, 237.

The passage of the Consulate of the Sea cited by Emerigon, is quoted by him in full. After declaring the master liable for cargo damaged by water, the Consulate continues:

"If the captain be insolvent, the ship is liable; and those who are thus injured are preferred to all other creditors, except the seamen," p. 336.

Sir Travers Twiss's version is:

"And if they do not suffice, the ship ought to be sold without the part owners or the creditors having any preference, saving always the mariners, who are not to lose their wages."

3 Black Book of the Admiralty, p 934.

Engelbrecht, in his German translation of the Consulate, appends this foot note to the passage:

"If he [the master] cannot pay, then the ship must be sold,

and the damage claim shall be a preference before the owners, and those who have lent money to the ship" (und die Schadenersetzung soll ein Vorzug vor den Rhedern, und vor denen haben, die Geld auf das Schiff geliehen). Engelbrecht, Corpus Juris Nautici, p 215 (Lübeck, 1790).

See Targa, Ponderazioni sopra la contrattazione Maritima, p. 198 (Ed. Genoa, 1803).

In the Italian version of the Consulate of the sea, Casaregis (in 1729) gives the following translation (having stated the case of the master unable to pay the damage):

"debbasi vendere la nave, perchè compagno ne prestatore non possono niente avere, (for neither the part owner, nor the lender can take anything) salvo li marinari che non perdono li salarj loro."

In his commentary on the text, Casaregis explains that this damage claim is to be paid, with a preference, ("*e pagarli con prelazione*").

Casaregis, Discursus legales, vol. 3, pp. 114, 115 (ed. Venice, 1790).

The authority of the Consulate is unique. It rests on no edict of a lawgiver. Having developed with minuteness the shipping usages and the customary law of former times, the Consulate of the sea is based on the *consensus gentium.* Grotius recognized in it the laws of the Greek and German Empires, as well as the regulations of later commercial States.

"Liber *consulatus maris* editus est lingua Italica, in quem relatae sunt constitutiones imperatorum Graeciae, Alemaniae, regum Francorum, Hispaniae, Syriae, Cypri, Balearium, Venetorum, Genuensium." De jure belli ac pacis, lib. III., 3 v.

Casaregis declared that by reason of its character as a record of sea customs it had become an acceptable international law for all countries.

"Consulatus maris qui in materiis maritimis debet inviolabiter attendi, uti universalis consuetudo non minus legis vigorem in se habens communiter apud omnes provincias et nationes recepta." Disc. XIX., §3.

Valin (in 1760) said :

" Après les loix romaines, les plus anciennes, comme les plus fameuses, que l'on connoisse sur le fait de la navigation et du commerce maritime, sont celles comprises dans une collection qui a pour titre, *il consolato del mare*, etc. C'est une compilation des anciennes loix maritimes servant à régler la police de la navigation et tout ce qui appartenoit alors au commerce dans les mers du Levant." * * *

" En un mot, ces ordonnances au décisions maritimes furent généralement adoptées par tous les peuples navigateurs."

Préface, Nouveau Commentaire sur l'ordonnance, viii. and x.

Emerigon (in 1780) replying to the criticisms of Hubner, upon the chapter of the Consulate which treats of prize, said :

" This author having found, in chapter 274, certain decisions opposed to his own system, fell into a rage against the whole work ; but had he studied it with any care, he would have been convinced that the decisions contained in the Consulate are founded in the law of nations. Hence they have secured the suffrages of nations. They have supplied ample materials to the compilers of the Ordonnance of 1681, and in spite of the gothic form with which they are sometimes clothed, one cannot but admire the spirit of justice and equity which has dictated them. (*On y admire l'esprit de justice et d'equité qui les a dictées.*)

Préface, Traité des Assurances, Vol. 1, p. VIII.

Capmany, in his Castilian edition of the Consulate, claiming authorship in Barcelona, said :

" Es el primer código escrito de los usos y costumbres con que los principales estados maritimos del levante dirigieron su navigacion y comercio desde los primeros siglos de la baxa edad, y el unico que por el consentimiento de todas la naciones comerciantes lleva el sello de derecho nautiça de las gentes."

Código de las Costumbres maritimas de Barcelona, Madrid, 1791, Discurso V, VI.

Boucher compared the authority of the Consulate, in the maritime law, with that of the Pandects in the Civil Law.

" Parmi les nations maritimes en particulier, le consulat de la mer jouit de la même autorité dont jouissent les Pandectes de Justinien parmi toutes les nations en général ; conséquemment, si les Pandectes sont souvent décisives dans les contesta-

tions civiles, le consulat de la mer n'est pas moins décisif dans les contestations commerciales et maritimes."

Boucher, Préface Consulat de la Mer, Tome I., p. iii., Paris, 1808.

A later writer says:

"Pour tout dire d'un mot, c'est le droit maritime tout entier à l'état d'archétype."

Cresp. Droit Maritime, tome I., p. 14 (Paris 1876).

Mr. Justice Story, writing of the Consulate in 1818, remarks that the question, what country is entitled to the honor of its origin, has been contested with as much zeal as the birthplace of Homer; and that it is the "grand reservoir from which have been drawn the principal ordinances of modern maritime nations." Referring to the praise of Casaregis, Emerigon, Valin, Vinnius and others, he continues:

"But in our judgment it is not necessary to resort to the *testimonia eruditorum*. The fact that the substance of its regulations was eagerly embraced, and immediately incorporated into the usages and the ordinances of all the maritime nations of the continent, pronounces a eulogy on its merits, which no formal vindication can surpass."

Story, Miscellaneous Writings, p. 101 (Boston, 1852).

In delivering the judgment of this court, in 1839, Mr. Justice Story followed the authority of the Consulate—"one of the earliest and most venerable collections of maritime law."

Columbia I. Co. *v.* Ashby, 13 Peters. 341.

Other cases in which the Consulate has been cited and followed by this court, are

Insurance Co. *v.* Dunham, 11 Wall., 34.
The *Scotland*, 105 U. S., 28.
The *Main*, 152 U. S., 126.

As has already been shown under the second point, the Admiralty Courts of this country have adopted the preference of damage claims upon the authority of the Consulate of the Sea and of Emerigon, rather than the postponement of them provided in the French Ordonnance.

The rank of privileges on vessels by the later continental codes cannot be an authority in our courts for the following reasons:

(*a*) The continental practice does not know and cannot administer a veritable maritime lien.

This Court said in 1870:

"Neither the writ of sequestration, nor the process of attachment, is a proceeding *in rem*, as known and practiced in the Admiralty, nor do they bear *any analogy whatever* to such a proceeding, as the suit in all such cases is a suit against the owner of the property, and not against the property *as an offending thing*, as in case where the libel is *in rem* in the Admiralty Court to enforce a maritime lien on the property."

Leon *v.* Galceran, 11 Wall., 185, 189.
See the *Belfast*, 7 Wall., 624, 644.

The modern procedure of the Continent ignores this comprehensive remedy. It requires suits to be against the owner or master, with the attachment of the vessel only as auxiliary to a personal suit. 5 Desjardins, Droit Maritime, §1112.

In France to-day there is no security, lien or privilege for collision. If the ship is judicially sold, the privileged and hypothecation debts of the owner are first paid. The collision creditor, thus outranked by even a mortgagee, comes in merely as one of the owner's general creditors (*créanciérs chirographaires*).

This distinction is fundamental. When mere personal liability becomes the foundation of the suit, the distinctive liability *in rem* is gone. Not only is there no admiralty lien, but no compensatory remedy at all, if the owner is irresponsible and the ship encumbered.

(*b.*) The privileges of these codes are mere rules for marshalling assets and administering funds, in analogy to bankruptcy, and following the practice as to ordinary movables, ignoring the peculiar rights and remedies of maritime commerce.

An example is found in the French code of commerce (Art. 191), where the eighth rank is given to the vendor of the vessel —which privilege is thus made to precede bottomry, and dam-

ages due to the cargo—an incongruity, as to which, a late writer says:

"La disposition de l'art 191.8° relative au vendeur est obscure, *et donne lieu à de grandes difficultés.*"

Lyon Caen, Traité de Droit Maritime, vol. 2, p. 595 (Paris, 1896).

How comes it that a legislator could ever give a superior vendor's privilege on a ship, that should override even the lien for money for the necessities of the voyage, and the vessel's obligations to cargo? Simply because a vendor was given a first lien on immovables (Code Civil, Art. 2103), and the fourth in order on movables (Art. 2102). Because there is no such thing as salvage in the Civil Code, and collisions at sea were not found there, the codifier of the Commercial Code wholly omitted those liens from his statutory priorities.

Not only does the French Code of Commerce (Art. 190) give the vendor a privilege, but extends it to his creditors, prior or subsequent to the sale!

(*c.*) They have the arbitrary and illogical characteristics of all statutes of continental countries ranking liens, which, appertaining exclusively to the *lex fori*, neither themselves rest on maritime analogies, nor furnish sound analogies to other jurisdictions.

According to the decisions of the German Courts before the present commercial code, even the preference of bottomry allowed at Hamburg was not regarded at Celle in Hanover. A decision of the Supreme Court of Appeals at Celle is as follows:

"The writing which forms the foundation of the pursuer's contention cannot give him the right of preference which he claims in relation to the impignorated vessel, *for a claim of bottomry according to our law does not involve any privileged right of security*, and the privileges which are accorded to it by the law of Hamburg cannot regulate the order of preference of real rights in a competition in this country, although the contract which gave rise to the real right may have been under the regulation of the law of Hamburg."

Bar, Private International Law, Guthrie's trans., p. 533n (2d ed. Edinburgh, 1892.)

The French code of commerce, and the codes which are patterned after it, except the recent codes of Denmark, Sweden, and Norway, give privileges to debts anterior to the voyage—even ranking them sometimes above those on the last voyage—a clear departure from the correct views of shipowners' limitation of liability.

(*d.*) To foster certain favored interests, they have departed from the ancient law of the sea, which secured full indemnity to the extent of the value of the offending *res.*

The French owner of vessels sunk by negligent collision, who compares the provisions of the French code with the exact justice given by the Roman and mediæval law, might well say with the old British maxim, "*Misera est servitus, ubi jus est vagum aut incognitum.*"

The Civil code of Lower Canada, based on both the French and English systems, deals in an interesting manner with the lien for collision.

Having declared in Article 2383 the order of privileges on vessels, and in Article 2385 the rank of liens on cargoes, a special exception follows:

ARTICLE 2387. "The order of privileges declared in the foregoing articles is without prejudice to claims for damage by *collision*, or for average contributions, or for salvage, which are paid by privilege after the debts enumerated at 1, 2, in Articles 2383 and 2385, and before or after other privileged debts according to the circumstances under which the claim has arisen, and the usage of trade." (Classes 1, 2 are the costs of seizure, and pilotage and harbor dues and penalties for breach of harbor rules).

ARTICLE 2388. "The provisions contained in this chapter do not apply in cases before the Court of Vice-Admiralty. Cases in that Court are determined according to the civil and maritime laws of England."

Civil Code of Lower Canada, vol. 2, p. 466 (Sharp Ed., Montreal, 1889).

Notwithstanding the judgments of this Court, delivered by Mr. Justice Story and Mr. Justice Bradley, declaring that the offending thing was looked to in the ancient law, doubts have of late been expressed as to the legal basis for this personifica-

tion of the wrong-doing vessel. Because the maritime procedure in the continental countries follows the ordinary practice in civil suits, and since Clerke's Praxis gives no form of writ *in rem* for collision, it has been questioned whether the ancient remedy for maritime torts was as complete as is now given by process *in rem*.

Those compilations of shipping law and custom which show the rise of independent sea courts, furnish evidence of a striking uniformity of usage, which, starting with the western Italian cities, quickly overspread the Mediterranean and passed out into the ports of Northern Europe, extending as far as Gothland and the easternmost towns of the Baltic. All have the same idea. When dealing with collisions, the ship is personified. From the middle of the twelfth, up to the fourteenth century, the ship itself, and not the owner, is declared primarily answerable for the whole or half damages.

In Pisa, a code of customary sea law was published in 1160, that became the maritime authority, first for that city, and afterwards for the commerce of the Florentine States, when Florence had subjugated Pisa, and appropriated its shipping, courts and laws.

This *Constitutum Usus* of Pisa, under Rubric XVI. : "De damno navi dato ab altera navi," enacted :

"Any ship, that culpably damages another ship, is held to make recompense ; as if any ship in calm weather enters a port and does damage to another ship, lying in the harbor, by striking it, it is bound to compensate it." (Alteri navi in portu standi percutiendo damnum fecerit, ei emendare teneatur.)

4 Pardessus, Lois Maritimes, p. 583.

The Consulate of the Sea, a century later, contains similar provisions, regarding collisions of vessels anchored and under way, and declaring the faulty ship bound to make restitution.

Chapters CLV., CLVI., and CLVII.

Thus if bad weather threatens, and a moored vessel neglects to heed the warning to moor more securely, given her by a vessel that has arrived subsequently, and she afterwards does damage by reason of her insufficient moorings :

"*She* is bound to make compensation for all the damages which she may have done to her, by reason of the warning which was announced and declared to them by those on board the ship or vessel which entered the last. But nevertheless, if the ship which first arrived has given out all her cable and has made every effort, whether she be in a place or not where she can find additional tackle, *she* is not responsible for the damage which she may do to the other."

3 Black Book of the Admiralty, p. 285.

Similar liabilities imposed directly on the colliding ships, either for the whole or half damages, appear in the collections of maritime law, that are deemed merely to have declared long-standing usages, observed by consuls, merchants, and judges in sea causes.

Les bons usages, etc., de la Commune d'Oleron (end of 13th. Century) Chap. 69, 2 Black Book of the Admiralty, p. 379.

Laws of Wisbuy (about 1266) Chap. 70.

4 Black Book, p. 284.

2 Peters Ad. Dec. Appendix, XC.

Statutes of Riga (1270) Chap. 157.

3 Pardessus Lois Maritimes, p. 505.

Art. 2 of the Hamburg Seerecht, treating of collisions, provides also for the case where the damaging vessel is insufficient to make good the loss. The whole article is:

"If two ships, at sea, or in port, by day or night, large or small, collide, and the one goes against the other so that it breaks and sinks, then that ship which remains afloat shall repair the full damage to the sunken ship and cargo, unless the master of the ship that stays afloat with her mate and crew, shall swear that it happened accidentally (undankes gescheen is). Then he pays only half the damage. If, however, the damage sustained by the sunken ship and cargo exceeds the value of the ship that stays afloat with its appurtenances at the time of the injury, the patron is not liable further. Also the merchant's goods that are in the colliding ship are not liable for the damage."

3 Pardessus Lois Maritimes, p. 348.

The Customs of Amsterdam, Enchuysen and Stavern, published in 1406, and embodying the sea usages of the commerce

of Holland, provide for this primary liability of ships for collision.

Art. 12.

"A ship sailing from Amsterdam or other port, one has collided with the other involuntarily, each bears half the damage (een ygelijk sal de Schade half gelden ende hebben). But if the collision was by design (met Willen) the one which damaged the other shall solely pay the damage (die Schade alleen gelden)."

1 Pardessus Lois Maritimes, p. 412.

A clear statement of the collision lien is found in the early Scandinavian maritime laws. The Code of Frederic II, promulgated in 1561 for Denmark and Norway (3 Pardessus 225, 241) contained the following rule for collision liability:

ARTICLE 56.—If a ship lie in the roads or in port, and another come in under sail and run down the ship at anchor or damage it otherwise, then the master who caused the injury shall pay the damage in full, from his own money so far as his means will go, in case it occurred through his negligence or imprudence. If he cannot pay, *the ship is reponsible for the damage* (da gielde Skibet Skaden) but not the goods of merchants.

3 Pardessus Lois Maritimes, 261.

This article was reproduced in almost the same words in the code of King Christian V of Denmark in 1683.

3 Pardessus, 289.

As has been well pointed out by the latest writer on the law of collisions, the formal statement of the legal theory of looking *only to the value* of the offending *res* is essentially a speculation of modern jurists. In the middle ages, the ship and freight were all that could be reached in case of a *foreign* ship-owner. Why should the *domestic* ship-owner fare worse? Once this idea had taken fixed possession of ship-owners, there soon came to be a customary law to that effect.

Prien, Zusammenstoss von Schiffen, p. 1030, Berlin, 1896.

In the practical working, the offending *res* must answer en-

tire, taking its value at the time of the injury or when it first reaches port. It is a later development that allows a personal liability limited to the value of vessel and freight. First grew up the real, special liability of the offending ship, set apart and devoted to reparation of the damage.

Obviously the sufferer has this in full. He cannot be postponed to the owner's creditors by contract. If his right is to be subject to the maxim *qui prior est tempore*, curious results will follow. Even the wife's right of dower, which was formerly recognized in vessels, would then have a priority. Indeed, in laws taken from those drawn by civilians, ignorant of the exigencies of commerce, the wife had a priority, if the date of her marriage settlement was before the other claims

Ch. 35 Valencian Regulations, 4 Black Book of Admiralty, p. 489.

That modern continental countries have reverted to different views, and have cut off the sea courts from their earlier jurisdiction is no sound argument against the adherence by this Court to ancient admiralty usages.

In Portugal there is no lien for collision (*City of Mecca*, 4 Asp., 412). And it is doubtful if any such lien is recognized in Scotland. (The *Dunlosit*, House of Lords, November 1896). But these defects in the law can have no analogies here. The lien of cargo against the carrying ship is not part of the present law of Scotland, England (*The Victoria*, 12 P. D., 105) or Canada, but this Court enforced it, as a rule or maxim of the sea law, even in case of a Canadian vessel which loaded in an English port.

The *Maggie Hammond*, 9 Wall., 435.

The whole system of the present Continental laws is so widely dissimilar from our procedure, allowing the lien *in rem* to all damage sufferers, as to make their codes no authority, even for the limited purpose of comparing liens with privileges.

This Court has recognized the wide departure of these codes from the general maritime law.

Liverpool Steam Co. *v.* Phœnix I. Co., 129 U.S., 444.

In view of the increasing frequency of collisions at sea, it is impossible to think that this Court will recede from its ancient position. It is no time now to abate any of the old restraints and remedies of the maxim, formulated by Roman lawyers, and reproduced in the Institutes, *alterum non laedere.*

Effectual redress of damage by collision requires the procedure *in rem.* To put off the collision claim upon any fraction of the culpable *res* is to abandon our distinctive procedure of holding the offending vessel as a pledge for reparation. The sufferer cannot be required to look for his remedy through the different titles, encumbrances and interests that are included in the *res.* He is therefore not to be postponed to debts for fuel, or supplies, which existed before the beginning of the voyage on which the casualty occurred.

In the *Main*, 152 U. S., 122, this Court held that statutes curtailing recovery of collision damage, and abridging the rights of damage sufferers, should be strictly construed. To postpone their rights to the coal bills and supply liens would be a means of rendering the collision remedy wholly illusory.

For these reasons, it is submitted that the question certified should be answered in the affirmative.

HARRINGTON PUTNAM,
Advocate for Appellants.

January, 1897.

Appendix.

A. P. Veazie *vs.* Schr. "Frank Herbert."

U. S. Distr. Court—Distr. of Mass.—June Term, 1878, No. 700.

Opinion:

Collision, Liens.—This vessel was arrested in a cause of collision, the owners did not appear, and on a hearing *ex parte* the damages were assessed at $867.47. The vessel was sold by the marshal and produced, net, $790.77. A petition was filed by the mate and one seaman for wages. Another petition was filed by a material man, J. P. Whitcomb, for repairs. The ship was owned in Massachusetts, the collision occurred near the coast of the State, April 22, 1878, and she put into Provincetown, where the repairs for which Whitcomb now petitions were put upon her by order of the master, beginning on the 27th of April. The libel was filed May 1, 1878, and most of the work was done after the marshal took possession. The petitioner took the requisite measures to obtain a lien under the law of the State.

J. C. Dodge, for libellants in collision.

O. W. Holmes, Jr., for Whitcomb.

West & Gould, for seamen.

Lowell, J. In the pressure which is upon the Court at this time, I will merely state my conclusions.

1. The seamen whose voyage was ended or nearly ended at the time of the collision cannot compete against the libellants in collision, or at all events, not without decisive evidence that the owners are insolvent. See the *Benares*, 7 Notes of Cases, Suppl. 50; the *Linda Flor*, Swabey, 309; the *Enterprise*, 1 Lowell, 455, and cases there cited.

2. I agree with the argument that repairs put upon the vessel after notice of the *lis pendens* would usually be postponed to the damages recovered in the litigation. I am further of the opinion that the priority given to material men by the statute of the State will not control this rule, because the statute supposes the materials to have been supplied innocently and under due authority. It does not intend to give power to an owner to supersede a lien already in litigation by ordering repairs to be put upon his vessel, and if it did I should much doubt the constitutional power of the Legislature to effect that purpose.

But as our statute of limited liability makes the ship and her owners liable only for the value of the vessel after the collision, I should say that any value that has actually been added since may be deducted again and allowed to the owners or to the material men in their interest. If, therefore, it can be proved, as was suggested, that the ship was actually injured to the extent of the repairs or to some extent, the petitioner may be allowed, from the proceeds, the amount of such enhanced value. I do not find as a fact that there was such an enhancement, but leave the matter to proof. I should hope, however, as the amount to be distributed is small, that the parties would adjust the controversy without further expense.

Petition of seamen dismissed.
Petition of Whitcomb to stand for evidence.